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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979
No.

SHIRLEY HAAS, individually and as Executrix under the Last Will and Testament of DANIEL HAAS, Deceased,

Petitioner,

vs.

MANUFACTURERS HANOVER TRUST CO., as Trustee of the Pension Fund of LANE BRYANT, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF

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QUESTION PRESENTED

1. Whether the Second Circuit Court of Appeals erred in affirming the District Court's holding that the filing of Amendments to Lane Bryant's Pension Plan did not make the amended Plan apply retroactively to the Petitioner's decedent?

STATEMENT OF THE CASE

In the Spring of 1979, the Petitioner filed the Complaint in the instant action in the United States District Court for the Southern District of New York. The Respondent moved to summarily dismiss the Complaint. The Honorable Morris E. Lasker on July 2, 1979 summarily dismissed the Complaint. Thereafter the Petitioner appealed the decision of Judge Lasker to the United States Second Circuit Court of Appeals. On December 3, 1979 after oral argument before it, the Court of Appeals affirmed the decision of Judge Lasker from the bench. The instant Petition seeks a Writ of Certiorari from the Supreme Court of the United States to the Court of Appeals.

STATEMENT OF FACTS

The Petitioner, Shirley Haas, is the widow of Daniel Haas, and Executrix of his Estate. The Petitioner's decedent was employed full-time until his death on November 17, 1975 by Lane Bryant, Inc. ("Lane Bryant"), a retailer of women's clothing.

The Respondent, Manufacturers Hanover Trust Company is, and has been since January of 1976, the Trustee of the Pension Fund of Lane Bryant, (the "Pension Fund"). The Pension Fund has been in continuous existence from 1942 to date.

The Petitioner's decedent, who was being paid at the rate of $34,500 per annum in 1975, was required by Lane Bryant's personnel policy to retire at the end of the semi-annual fiscal period in which he became sixty-five years of age. In the case of the Petitioner's decedent, the last day that he could be a full-time employee was January 31, 1976. The Petitioner's

decedent chose the last possible day on which to retire, i.e., January 31, 1976, and he also chose as a form of pension to be paid to him when he did retire, the "Optional Method". Under this Optional Method, a guaranteed amount of pension payments would be made to the pensioner, or his named beneficiary, after the retirement of the employee. Because of his considerable service for Lane Bryant, the Petitioner's decedent could have retired and commenced receiving pension benefits at anytime after his sixtieth birthday. The Petitioner's decedent, however, chose to remain a full-time employee and enjoy the benefits of his considerable salary, as well as group term life insurance and other fringe benefits, for as long as possible. When the Petitioner's decedent died on November 17, 1975, he was still a full-time employee, and the Petitioner did not receive any part of the Optional Method of pension, which Petitioner's decedent had chosen, because the Petitioner's

decedent had died prior to his retirement date and while a full-time employee. Although the Petitioner did not receive the pension which she is now seeking to recover, in the amount of $66,476.50, she did receive $106,249.50 under Lane Bryant's group term life insurance policy. (See, footnote 1 of Judge Lasker's decision) (13a). A substantial portion of the premium for that life insurance was paid by Lane Bryant and such payment by Lane Bryant would terminate on an employee's retirement.

In July of 1976, the Petitioner commenced suit in the Supreme Court of the State of New York, Kings County, against the Trustees of the Pension Fund, to recover the pension allegedly due the Appellant. (A-37)*

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*("A" refers to the Appendix on appeal before the Second Circuit Court of Appeals.)

In January of 1977, the Honorable Irwin Brownstein, on the Respondent's Motion for summary judgment, dismissed the Petitioner's Complaint. (A-46)

Thereafter, the Petitioner appealed Justice Brownstein's decision, to the New York State Appellate Division, Second Department. The Appellate Division unanimously affirmed Justice Brownstein's decision. Requests by the Petitioner for leave to re-argue, or for permission to appeal to the New York Court of Appeals, were denied by both the Appellate Division, Second Department, and the Court of Appeals.

The Petitioner's Complaint before the New York Supreme Court alleged as one of its Causes of Action that the Employees' Retirement Income Security Act of 1974 ("ERISA") applied to Lane Bryant's Pension Plan, and, therefore, the Petitioner was entitled to the pension selected by the Petitioner's decedent. (A-38,44).

Justice Brownstein held that November 17, 1975, the date of the Petitioner's decedent's death, was the date on which his and the Petitioner's rights were to be determined. Justice Brownstein found that on November 17, 1975, ERISA, by its own provisions, was not applicable to Lane Bryant's Pension Plan and since the Petitioner's decedent was a full-time employee of Lane Bryant on that date, by the terms of Lane Bryant's Pension Plan (Article 12), the Petitioner was not entitled to the pension the Petitioner's decedent had chosen to be paid commencing when he retired. (A-46-50).

Since Lane Bryant's Pension Plan was in existence before January 1, 1974, ERISA required that Lane Bryant's Pension Plan be amended to conform with the sections of the Internal Revenue Code added or amended by ERISA, no later than the first day of the Plan's fiscal year commencing after December 31, 1975 (i.e., February 1, 1976). (A-93-95). In

order to make the Plan conform, the Board of Directors of Lane Bryant adopted an Amended Pension Plan in December of 1976, which in February of 1977 was submitted to the Internal Revenue Service for its approval. This Amended Plan was stated to be effective as of February 1, 1976 and was designed to make the Plan's provisions conform with the Internal Revenue Code as amended by ERISA. (A-58-88). The Amended Plan was approved by the Internal Revenue Service as conforming with the Internal Revenue Code as amended by ERISA in May of 1977. (A-92).

Lane Bryant's Board of Directors has, subsequent to February of 1977, adopted other amendments to the Pension Plan, which by their expressed terms, became effective commencing on the date of approval by the Internal Revenue Service, and which would affect persons who were, at the time of the amendments became effective, participants in the Pension Plan.

None of these later amendments were required for Lane Bryant's Pension Plan to comply with the Internal Revenue Code as amended by ERISA.

Thereafter, in 1979 the Petitioner filed the instant Complaint in the United States District Court for the Southern District of New York. The Complaint alleged that by reason of one or more of the amendments to Lane Bryant's Pension Plan, the Plan as amended, somehow should be applied retroactively to November 17, 1975, the date of the Petitioner's decedent's death, resulting in the Petitioner being entitled to the pension selected by Petitioner's decedent.

ARGUMENT

POINT I

THE PRIOR STATE COURT ADJUDICATION IS RES JUDICATA OF THE APPELLANT'S CLAIM.

The state court decision is res judicata as to the fact that November 17, 1975, the date of death of Petitioner's decedent is the date for determining Petitioner's rights under Lane Bryant's Pension Plan.

It is beyond dispute that Congress did not make the provisions of ERISA retroactive so as to entitle the Petitioner to benefits under Lane Bryants, Pension Plan. Riley v. Meba Pension Trust, 570 F.2d 406, 411 (2d Cir. 1977); Schlansky v. United Merchants & Manufacturers, Inc.,443 F.Supp. 1054, 1064 (S.D.N.Y. 1977).

The retroactivity of the provisions of ERISA was before the State Court in the Petitioner's prior related action. There the Court held:

> "The plaintiff's second cause, which relies on the Employment Retirement Income Security Act of 1974 ("ERISA"), does not state a cause of action, since ERISA is not applicable to the Plan. U.S.C.A. Title 29, Section 1061(b)(2), provides that where a plan was in existence on January 1, 1974, as was the case with the Lane Bryant Plan, the application of ERISA is deferred to Plan years beginning after December 31, 1975. (Lane Bryant's ERISA plan year began February 1, 1976). As plaintiff's decedent had died on November 17, 1975, before retirement and before ERISA became applicable, his beneficiary acquired no vested right to accrued benefits." (A-48-49).

Congress in enacting ERISA expressly provided for the effective date of the statute existing pension plans. 29 U.S.C. Section 1061(b)(2) provides:

> "...(i)n the case of a plan in existence on January 1, 1974, this part shall apply in the case of plan years beginning after December 31, 1975." (A-93).

The provisions of the Plan as amended to conform with ERISA are inapplicable to the Petitioner's decedent, because his employment

terminated prior to the effective date of ERISA to the Plan. Fremont v. McGraw-Edison Co., 606 F.2d 752 (7th Cir. Sept. 27, 1979). In Fremont, an employee who terminated his employment on December 31, 1975 the day before the effective date of ERISA to his employer's pension plan was denied a pension. Had he terminated his employment in 1976 he would have received a pension. Id. Similarly, in Schlansky, supra, where the Plaintiff employee was terminated on August 31, 1975, and the effective date of ERISA to the plan was July 1, 1976, Judge Werker held:

> "Plaintiff was discharged on August 31, 1975, almost a full year before the vesting provisions became effective. I will not take a statute into which Congress deliberately and carefully incorporated delayed effective dates and apply it retroactively. Keller v. Graphic Systems of Akron, Inc., 422 F.Supp. at 1009. Count V is accordingly dismissed for failure to state a claim upon which relief may be granted since I find no violation of ERISA's vesting provisions under 29 U.S.C. Section 1053 in this case."

Likewise, Judge Lasker in dismissing the Complaint in the instant action pointed out:

> "Nothing suggests that Congress intended that ERISA's provisions were to become retroactively effective as soon as a pension plan was amended to conform to ERISA's requirements." (A-178).

Thus, it is beyond peradventure that the provisions of the Plan as amended to conform with ERISA are inapplicable to the Petitioner's decedent and the prior state court adjudication denying the Appellant a pension is res judicata of the Appellant's claim.*

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*In addition, the prior state court adjudication is res judicata of the fairness of Lane Bryant's Pension Plan. However the fairness of the Plan was not an issue before the District Court or the Court of Appeals. Rather, in the instant federal action the Petitioner has based her claim upon an amendment(s) to the Plan promulgated subsequent to the prior state court adjudication.

POINT II

THE ONLY WAY THE PROVISIONS OF ERISA COULD APPLY RETROACTIVELY TO THE APPELLANT'S DECEDENT IS IF LANE BRYANT'S PLAN ADMINISTRATOR MADE AN ELECTION PURSUANT TO SECTION 1017(d) OF ERISA AND THE PLAN ADMINISTRATOR MADE NO SUCH ELECTION.

Section 1017(d) of ERISA provided:

> Existing plans may elect new provisions.---In the case of a plan in existence on January 1, 1974, the provisions of the Internal Revenue Code...shall apply in the case of the plan year (which begins after the date of the enactment of this Act (September 2, 1974) but before the applicable effective date determined under subsection (b)...) selected by the plan administrator and to all subsequent plan years, if the plan administrator elects (in such manner and at such time as the Secretary of the Treasury or his delegate shall be regulations prescribe) to have such provisions so apply. (A-97).

See, also, Section 211(d) of ERISA, 29 U.S.C. Section 1061(d).

The Internal Revenue Regulation Section 1.410(d) promulgated by the Internal Revenue Service pursuant to Section 1017(d) of ERISA,

provided:

> (d) Certain existing plans may elect new provisions--(1) In general. The plan administrator... of a plan that was in existence on January 1, 1974 may elect to have the provisions of (ERISA)...apply to a plan year selected by the plan administrator which begins after September 2, 1974 but before the otherwise applicable effective date determined under Section 1017(b) ...of ERISA...
>
> (3) Procedure and time for making election. An election under this paragraph shall be made by attaching a statement to either the annual (tax information) return...which is filed for the first plan year for which the election is effective or to a written request for a determination letter relating to the qualification of the plan under (ERISA)...The statement shall indicate that the election made under Section 1017(d) (of ERISA) and the first plan year for which the election is effective. (A-98).

In order for Lane Bryant's plan administrator to elect to make the provisions of the Plan apply retroactively to the plan year within which the Petitioner's decedent died, the plan administrator was required under Rev. Reg. Sec. 1.410(d)(3) to file an election

complying with the following requisite elements:

> (1) The administrator must file a written election;
>
> (2) The election must be contained in either (a) the annual return required under Section 6058(a) of the Internal Revenue Code or a request to the Internal Revenue Service for a determination letter;
>
> (3) The election must indicate that it is made under Section 1017(d) of ERISA; and
>
> (4) The election must state the first plan year for which the election is effective.

It is beyond dispute that the plan administrator of Lane Bryant's Pension Plan did not perform any of the requisite elements of Rev. Reg. Sec. 1.410(d)(3). No election was filed in any return or request for a determination letter submitted by the administrator of the Pension Plan to the Internal Revenue Service. The Plan administrator never made any reference to an election under Section 1017(d) in any return or request for a determination letter. Nor did the plan administrator ever state that the first plan year as to which Amendments to the Plan were effective, was February 1, 1975 the plan year within which the Petitioner's decedent died.

On the contrary, the Plan as amended and approved by the Internal Revenue Service provided:

> "The Plan has been subsequently amended on occasion and effective as of February 1, 1976, the Company adopted and amended and restated Plan, as set forth herein. (emphasis added.)
>
> The Trust Indenture dated November 27, 1942 was amended and restated as of January 31, 1976 and is intended to form a part of the Plan. (emphasis added.)
>
> The Plan and Trust are intended to meet the requirements of Sections 401(a) and 501(a) of the Internal Revenue Code of 1954, as amended by the Employee Retirement Income Security Act of 1974 (ERISA").
>
> The provisions of this Plan shall apply only to a Participant who terminates employment or retires on or after the Effective Date.

> The rights and benefits, if any, of former participants shall be determined in accordance with the prior provisions of the Plan in effect on the date his employment terminated or he retired." (emphasis added.) (A-100).

Thus, it is beyond peradventure that the Trustees and Plan Administrator never intended to, nor did they ever make, an election under Rev. Reg. Sec. 1.410(d). And the Plan as amended had no retroactive application to increase the rights of the Petitioner or Petitioner's decedent under the Plan.

POINT III

NEITHER ERISA NOR THE INTERNAL REVENUE CODE REQUIRE THEIR PROVISIONS APPLY RETROACTIVELY

In Point VI of the Petitioner's Petition, certain sections of the Labor Laws and of the Internal Revenue Code are cited and quoted to the effect that these laws have retroactive effect. A reading of the cited sections clearly show otherwise.

Those sections discuss the right of a plan administrator to amend a pension plan retroactively to an earlier plan year. They do not make the laws themselves apply retroactively. Section 1082(c)(8)(A) of Title 29 U.S.C. reads as follows:

> "For purposes of this part, any amendment applying to a plan year which is adopted after the close of such plan year but no later than 2-1/2 months after the close of the plan year (or, in the case of a multiemployer plan,

no later than 2 years after the close of such plan year..."*

Thus, any amendment to have retroactive effect must under Section 1082(c)(8)(A) have been adopted within 2-1/2 months of the end of the plan year to which it applies. No amendment of Lane Bryant's Pension Plan

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*In addition, Lane Bryant, and its wholly-owned Subsidiaries, are by definition "one employer". Subparagraph 37(A) of Section 3 of ERISA defines the term multiemployer plan". This is found in Section 1002 (37)(A) of Title 29 U.S.C. which provides in part, as follows, in 1002 (37)(B)(ii):

> "ii. all corporations which are members of a controlled group of corporations (within the meaning of section 1563(a) of Title 26, determined without regard to section 1563(e)(3)(C) of Title 26) shall be deemed to be on employer."

Lane Bryant's Subsidiaries, are all wholly-owned by the parent Delaware corporation. Lane Bryant meets the definition of a Parent-Subsidiary controlled group in Section 1563(a)(1) of Title 26 U.S.C.

was made or adopted until December of 1976 which is more than ten months after the end of the plan year in which Petitioner's decedent died (which was the plan year ended January 31, 1976).

Similarly, Section 412(c)(8) of the Internal Revenue Code provides the manner in which permitted retroactive amendments can be made to pension plans under the tax laws. The language of Section 412(c)(8) is substantially the same as that quoted above from the Labor Laws. Thus, there could be no retroactive application of Lane Bryant's Amended Pension Plan to the plan year in which Petitioner's decedent died under either Section 1053(a)(3)(C) of Title 29 U.S.C. or Section 411(a)(3)(C) of Title 26 U.S.C. The Petitioner's argument and reasoning on this Point is without merit.

POINT IV

PETITIONER HAS CLEARLY MISINTERPRETED THE PROVISIONS OF ERISA.

Petitioner claims that Section 1053(a)(3) of Title 29 U.S.C. required that Lane Bryant's Amended Pension Plan effective February 1, 1976, conform to ERISA and therefore not contain a provision allowing forfeiture of vested pension rights for death during employment. This interpretation is contrary to a plain reading of the cited statute which says that a plan can provide that no pension is payable if a vested participant dies while a full-time employee and the employee's vested rights will still be considered non-forfeitable. Lane Bryant's Amended Pension Plan does, in fact, contain a provision similar to the old Article XII. This is Section 6.2 of the present Plan, which has been approved by the Internal Revenue Service and which reads as follows:

> "6.2 No benefits of the Plan shall be available to any Participant, or to any beneficiary designated under the Optional Method or to the Eligible Spouse of a Participant, in case of the death of such Participant before the Participant has retired pursuant to this Plan, unless the Participant was covered under the benefits provided by Section 5.3."

Section 5.3 of the Plan provides for joint and survivor annuity coverage of Participants for periods prior to retirement.

ERISA and both the Tax laws (Title 26) and the Labor Law (Title 29) thus, do, in fact, allow a plan to provide that no pension benefits are payable if a vested Participant dies while a full-time employee. Congress knew that these persons would be covered by other employer benefits as Petitioner's decedent was in this situation.

CONCLUSION

The Petitioner Shirley Haas' Petition for a Writ of Certiorari should be denied in all respects and the decision and Order of the United States Second Circuit Court of Appeals should be affirmed in all respects.

Respectfully submitted,

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